

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-212933

DATE: January 26, 1984

MATTER OF: American Sterilizer Company

DIGEST:

1. Protest that specifications set forth in request for quotations contain alleged impropriety is dismissed as untimely where this protest issue was raised for first time in offer submitted in response to request for quotations. Such issues are to be filed prior to closing date in accord with section 21.1(b)(1) of GAO Bid Protest Procedures. 4 C.F.R. § 21.1(b)(1) (1983).
2. Protest that agency improperly issued delivery order to higher priced Federal Supply Schedule contractor is denied. Record shows that protester's offered equipment did not meet 1-minute memory requirement set forth in request for quotations and GAO cannot find that award to higher priced offeror which met all specifications was unreasonable in such circumstances.

American Sterilizer Company (AMSCO) protests the Department of Health and Human Services' (HHS) rejection of its offer and the issuance of a delivery order to Castle Company, Division of Sybron Corporation (Castle), pursuant to request for quotations (RFQ) No. 21-78712. The delivery order, placed under Castle's Federal Supply Schedule contract No. GS-00S-63123, is for a microcomputer-controlled steam sterilizer (Castle model No. 3322). AMSCO contends that the sterilizer it offered meets or exceeds all RFQ specifications at a lower price and it should have been awarded the contract.

The protest is denied in part and dismissed in part.

In response to the protest, HHS reports that the Castle sterilizer is only about 4 percent higher in price than the AMSCO sterilizer and that the Castle equipment is technically superior to the AMSCO equipment in a number of ways which justify the price differential. The record also

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shows that the contracting officer based his decision to choose Castle over AMSCO, in part, upon the advice of the project engineer who indicated that AMSCO had provided unreliable service on its equipment in prior years. However, because there was no documentation to support the project engineer's charge that unreliable maintenance had been provided by AMSCO, HHS specifically withdrew this allegation as a reason supporting the decision to award to Castle.

Purchase from the General Services Administration's multiple-award Federal Supply Schedules is governed by the Federal Property Management Regulations (FPMR), which provide, in pertinent part, as follows (41 C.F.R. §§ 101-26.408-2 and 101-26.408-3 (1983)):

"§101-26.408-2 Procurement at lowest price.

"Each purchase of more than \$500 per line item made from a multiple-award schedule by agencies required to use these schedules shall be made at the lowest delivered price available under the schedule unless the agency fully justifies the purchase of a higher priced item. * * *

"§101-26.408-3 Justifications.

"(a) Justifications of purchases made at prices other than the lowest delivered price available should be based on specific or definitive needs which are clearly associated with the achievement of program objectives. Mere personal preference cannot be regarded as an appropriate basis for a justification. Justifications should be clear and fully expressed. * * *"

These clauses require federal agencies which procure from a multiple-award Federal Supply Schedule to do so at the lowest price consistent with their minimum needs. See Quest Electronics, B-193541, March 27, 1979, 79-1 CPD 205, and cases cited therein. Determinations as to the needs of an agency and which products on the Federal Supply Schedule meet those needs are matters primarily within the jurisdiction of the procuring agency and with which we will not interfere unless they clearly involve bad faith or are

not based on substantial evidence. 52 Comp. Gen. 941, 944 (1973). Thus, once the procuring agency determines its minimum needs, it is required to procure from the lowest priced supplier on the schedule, unless it makes an appropriate justification for purchase from a higher priced supplier. Our Office does not believe a legal objection to the agency's determinations is warranted unless those determinations are shown to be totally unreasonable.

We cannot find, as AMSCO urges, that the contracting officer's decision in this case was totally unreasonable.

The RFQ set forth a number of specifications which were to be met by all offerors. One of the RFQ's specifications stated that, "In event of house power failure, microcomputer controls shall hold cycle parameters for one full minute duration, with default capability that restores programmed cycle selections should power failure last longer than one minute." AMSCO's offer took exception to this requirement and stated that, "AMSCO's design and specification provides for retention of cycle status if power is lost for 20 milliseconds, not one (1) minute." The AMSCO offer further stated, "Our experience indicates that power outages of longer time than just outlined will extend beyond one (1) minute and does not warrant the battery backup system that would increase hospital maintenance costs."

Insofar as AMSCO's protest can be interpreted as alleging that the RFQ overstated the agency's minimum needs or was otherwise deficient because of the requirement that the sterilizer be able to hold cycle parameters for 1 minute in the event of a power failure, the protest is untimely. Our Bid Protest Procedures require that protests alleging improprieties in any type of solicitation must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983). Since this alleged impropriety should have been apparent to AMSCO upon reading the RFQ, but was not objected to by AMSCO until it submitted its offer, the protest is untimely. See Lewis Corporation, B-194213, April 2, 1979, 79-1 CPD 228.

AMSCO further contends that the required 1-minute memory in the event of a power failure is a minor feature which should not be a cause for rejection of its offer. AMSCO argues, among other things, that most power failures are more than 1 minute in duration and, therefore, the

effective difference between its sterilizer and Castle's sterilizer is negligible as far as the memory feature is concerned. However, HHS contends that, according to its engineers, most power failures are for "only a few seconds." According to HHS's report on this protest, this feature (along with others cited as support for the award to Castle) will minimize downtime associated with the sterilizer. Downtime is cited by the project engineer as being very costly to scientific research and the purchased sterilizer is cited as a mandatory type of research equipment. AMSCO has also pointed out what it believes are advantages to having a 20-millisecond (1/50th of a second) memory rather than a 1-minute memory with automatic reset. One alleged advantage is the decreased likelihood of "over cooking" the laboratory media by having the sterilizer heat the media for a substantial time, followed by a power failure of more than 1 minute, followed by automatic reset and reheating the media for the full preset cycle. Castle argues that its sterilizer is better because, with 1-minute memory, operator intervention is not required to complete the sterilization cycle after power failures of less than 1 minute, but more than 20-milliseconds.

In essence, what we have here is a disagreement between AMSCO and HHS/Castle regarding the advantages and disadvantages of the two types of memory features. Apparently, there are some advantages to either length memory feature.

As previously indicated, the determination of an agency's minimum needs and how best to meet them consistent with the requirement for the broadest practicable competition primarily is the using agency's responsibility, in part, because the user is the one most familiar with the conditions under which the needs have arisen and have been met previously. Carolina Concrete Pipe Company, B-192361, March 4, 1981, 81-1 CPD 162. Moreover, we have consistently held that in technical disputes, a protester's disagreement with the agency's opinion, even where the protester's position is supported by expert technical advice, does not invalidate the agency's opinion. See London Fog Company, B-205610, May 4, 1982, 82-1 CPD 418.

Accordingly, we are unable to conclude that the determination to award to the higher priced Federal Supply Schedule contractor was unreasonable in this case because the determination was based, in part, upon a need for a

1-minute memory feature and this requirement was clearly set forth in the RFQ. Since AMSCO's sterilizer did not meet this requirement, AMSCO's offer was properly rejected and award made to Castle. In view of this finding, we need not consider whether the other technical bases for choosing Castle over AMSCO in this procurement were reasonable.

In accord with the above, we deny the protest in part and dismiss it in part.

Milton J. Aroian
for Comptroller General
of the United States